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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

BINYAM MOHAMED; ABOU ELKASSIM BRITEL; AHMED AGIZA; MOHAMED FARAG AHMAD BASHMILAH; BISHER AL-RAWI Plaintiffs, v. JEPPESEN DATAPLAN, INC. Defendant.	Case No. C-07-02798-JW REPLY IN SUPPORT OF MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT BY THE UNITED STATES OF AMERICA Judge: Hon. James Ware Hearing Date: February 5, 2008 Hearing Time: 1:00 PM Courtroom: 8, 4th Floor

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INTRODUCTION

Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, concedes that the public Declaration filed by Gen. Michael V. Hayden. USAF, Director, Central Intelligence Agency ("Director"), meets all of the procedural requirements necessary for the Government to assert the state secrets privilege in this case. With this concession, plaintiffs principally argue that the privilege assertion should not be accepted because it is premature. That argument is without merit.

The state secrets privilege prevents the disclosure of information in litigation when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *see also Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998); *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007). Courts must perform a three-step analysis in any case where the United States asserts the privilege. First, the Court must determine whether the procedural requirements for invoking the privilege have been satisfied. *Reynolds*, 345 U.S. at 7-8; *Kasza*, 133 F.3d at 1165; *Al-Haramain*, 507 F.3d at 1202. Second, and without divulging the information the privilege was asserted to protect, the Court must make an independent assessment of whether the privilege is properly asserted. *Reynolds*, 345 U.S. at 8; *Kasza*, 133 F.3d at 1155-56; *Al-Haramain*, 507 F.3d at 1202. Third, if the Court concludes that the privilege has been properly asserted, the privileged information is "completely removed from the case," and the court must then decide whether, and how, the case can proceed. *Kasza*, 133 F.3d at 1166; *see also Al-Haramain*, 507 F.3d at 1202-04.

It is well-established that if the privileged information is necessary to litigate the case to completion, the Court must resolve the case at the outset so as not to "jeopardize the security which the privilege is meant to protect." *Reynolds*, 345 U.S. at 10. *See, e.g.*, *Al-Haramain*, 507 F.3d at 1205 (plaintiff could not establish standing without privileged information); *El-Masri v. United States*, 479 F.3d 296, 308-11 (4th Cir.), *cert. denied,* 128 S.Ct. 373 (2007) (pleading-stage resolution appropriate because parties could not litigate the merits of their claims and defenses without privileged information); *Sterling v. Tenet*, 416 F.3d 338, 347-48 (4th Cir. 2005), *cert. denied sub*

nom. Sterling v. Goss, 546 U.S. 1093 (2006) (same); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (same); *Kasza*, 133 F.3d at 1170 (same); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) (same); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1142-44 (5th Cir. 1992) (same); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991) (same).

Plaintiffs, who contend that the Government's state secrets privilege assertion is premature because "the very subject matter" of this action is not a state secret, improperly conflate the second and third steps of this analysis. Before this Court considers whether the case can proceed without the privileged information, it must *first* determine whether the privilege has properly been asserted. *See, e.g.*, *Al-Haramain*, 507 F.3d at 1203-04 (upholding Government's assertion of state secrets privilege despite concluding that the very subject matter of the case was not a state secret). Plaintiffs' strategy is to convince this Court to defer its consideration of the United States' privilege assertion so that the case can proceed into discovery, at which point they believe that the privilege must be asserted on an "item-by-item" basis. But they have not cited -- and cannot cite -- a single case in which a court has deferred consideration of a state secrets privilege claim until some unspecified, later point in time.

Nor have plaintiffs even attempted to argue how this case could be litigated to completion without the information over which the United States has asserted the state secrets privilege. The failure to attempt such a showing is unsurprising, because it is clear that the case cannot go forward if the privilege is accepted. The state secrets privilege will "completely remove[] from the case," *Kasza*, 133 F.3d at 1166, all of the information described in the Director's declarations, which includes, but is not limited to: whether these plaintiffs were part of the CIA terrorist detention and interrogation program ("CIA program"); whether defendant assisted the CIA in conducting the program; whether countries named in the First Amended Complaint (specifically, Morocco and Egypt) assisted with the program; and other, classified operational details of the program (such as the locations where the CIA detained individuals and the interrogation methods used as part of the program). *See* Formal Claim of State Secrets and Statutory Privileges by General Michael V.

Hayden, USAF, Director, Central Intelligence Agency ("Public Hayden Decl.") (Dkt. no 43-2) ¶ 20.[1] Plaintiffs' claims, which allege that defendant assisted the United States and foreign governments in carrying out clandestine intelligence activities, cannot be litigated without this information.

Plaintiffs' view of the case is simply too near-sighted. Regardless of whether the "very subject matter" of this litigation is a state secret, it is apparent *now* that the case cannot be litigated without revealing classified details about how the United States conducts clandestine intelligence activities. *See Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) (noting that "the whole object of the suit" in *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 537 (E.D. Va. 2006), "was to reveal classified details regarding 'the means and methods the foreign intelligence services of this and other countries used to carry out the [CIA] program'" at issue in this case (citation omitted)). Given the inevitable necessity to dispose of this suit, which cannot be litigated through any stage without risking harm to national security -- let alone to judgment -- the Court should resolve the suit at the outset without requiring further proceedings, which would only risk disclosing the very information that the privilege has been asserted to protect. *See, e.g.*, *El-Masri*, 479 F.3d at 305 (dismissing case because the "central facts" necessary to litigate the suit "remain state secrets"). "Courts are not required to play with fire and chance further disclosure -- inadvertent, mistaken, or even intentional -- that would defeat the very purpose for which the privilege exists." *Sterling*, 416 F.3d at 344; *see also Reynolds*, 345 U.S. at 10 ("[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.").

ARGUMENT

I. THE UNITED STATES PROPERLY ASSERTED THE STATE SECRETS PRIVILEGE

The first step in determining whether the privilege has been properly asserted is to ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. *Al-Haramain*, 507 F.3d at 1202. "There must be a formal claim of privilege, lodged by the head of the

[1] The full extent of the information covered by the privilege is described in the *in camera*, *ex parte* Declaration of Gen. Michael V. Hayden, USAF, Director, Central Intelligence Agency ("Classified Hayden Decl."), which has been lodged for this Court's review. *See* Notice of Lodging of Classified *in camera*, *ex parte* Declaration (Dkt. no 43-3).

department which has control over the matter, after actual personal consideration by the officer." *Reynolds*, 345 U.S. at 7-8 (footnotes omitted). Plaintiffs concede these requirements have been met. *See* Memorandum of Plaintiffs in Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment (Dkt. no. 50) ("Pls. Opp.") at 20 n.4.

Thus, this Court can proceed directly to the second step of the state secrets analysis, in which it "must determine whether the circumstances before [it] counsel that the state secrets privilege is applicable, without forcing a disclosure of the very thing that the privilege is designed to protect." *Al-Haramain*, 507 F.3d at 1202. The Ninth Circuit has held that "[t]he asserted claim of privilege is accorded the 'utmost deference' and the court's review of the claim of privilege is narrow: the court must be satisfied that under the particular circumstances of the case, 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" *Kasza*, 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at 10); *see also Sterling*, 416 F.3d at 345 ("[W]hen a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not -- indeed, should not -- probe further."); *Zuckerbraun*, 935 F.2d at 547 (articulating "utmost deference" standard); *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) ("*Halkin I*") (same). In *Al-Haramain*, 507 F.3d at 1203, the Ninth Circuit recently reaffirmed "the need to defer to the Executive on matters of foreign policy and national security" and found that it "surely cannot legitimately find [itself] second guessing the Executive in this arena." *See also El-Masri*, 479 F.3d at 305 ("The executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis . . . ."); *Halkin I*, 598 F.2d at 9 ("The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." (citation omitted)); *Ellsberg v. Mitchell*, 709 F.2d 51, 57 n.31 (D.C. Cir. 1983) ("[T]he probability that a particular disclosure will have an adverse effect on national security is difficult to assess, particularly for a judge with little expertise in this area.").[2]

[2] Plaintiffs argue that the United States' "sweeping theory" of "judicial 'deference'" has "been rejected in several recent 'state secrets' decisions that the government entirely ignores." Pls. Opp. at 19; *see also id.* at 22 (arguing that "the deference [the government] demands for the CIA

Gen. Hayden's public and *in camera*, *ex parte* declarations amply demonstrate that "there is a reasonable danger that compulsion of the evidence [subject to the privilege] will expose military matters which, in the interest of national security, should not be divulged." *Kasza*, 133 F.3d at 1166. In fact, those declarations explain in great detail how litigation concerning the operational details of alleged clandestine intelligence activities reasonably could be expected to damage national security.

Plaintiffs do not dispute directly Gen. Hayden's assertions about the harms that would follow from such disclosures. Instead, they attempt to obscure the question by pointing to (and lodging with this Court) a large volume of public sources speculating about the still-classified details of the CIA program, and asserting that these sources provide reason for this Court to conclude that the "very subject matter" of this suit is not a state secret. *See, e.g.*, Pls. Opp. at 36.[3] As noted above, this argument improperly conflates the second and third steps of the state secrets inquiry. Determining if the "very subject matter" of a case is a state secret is part of the Court's consideration of whether the case can proceed *in light of* an assertion of the privilege, and is not part of the calculus in determining whether the privilege itself was properly asserted. The distinction between these steps is crucial; as discussed below, there are many reasons why a case may be resolved at the pleading stage in response to an assertion of the state secrets privilege. A court may do so not only if "the

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director's predictive judgments[] effectively render[s] the judicial role irrelevant"). This contention, which is unsupported by any citations, is mystifying; virtually every case to discuss the privilege recognizes that courts must afford the "utmost deference" to the Executive Branch's assessments of the harms that would flow from the disclosure of particular information. In repeating that controlling standard, the United States does not in any way denigrate the important function that this Court performs when deciding whether the privilege is properly invoked. On the contrary, and out of respect for this Court's function, Gen. Hayden's classified declaration provides the Court with a detailed account of the scope of information subject to the privilege and the harms that would result from its disclosure -- as is the United States' standard practice in state secrets litigation. *See, e.g.*, *Al-Haramain*, 507 F.3d at 1203 (government's privilege assertion was "exceptionally well documented"); *Kasza*, 133 F.3d at 1169 (submission of classified declarations for *in camera, ex parte* review is "unexceptional" in state secrets cases).

[3] Plaintiffs devote more than ten pages of their opposition to arguing that *Al-Haramain* requires this Court to reject *El-Masri* and hold that the "very subject matter" of this case -- which concerns the same CIA program -- is not a state secret. *See* Pls. Opp. at 25-36. That argument ignores the plain language of *Al-Haramain*, which notes that "[i]ndeed, in [*El-Masri*], the facts may have counseled for such an approach." *Al-Haramain*, 507 F.3d at 1201.

very subject matter" of the litigation is a state secret, but also if the parties cannot litigate their claims and defenses without the privileged information. *Al-Haramain* perfectly illustrates this point. Even though the "very subject matter" of that suit was not a state secret, the Court considered *and accepted* the "exceptionally well documented" state secrets privilege assertion at the outset, and as a result concluded that the plaintiffs' inability to establish standing without the privileged information required dismissal. *Al-Haramain*, 507 F.3d at 1203, 1205.

Moreover, these public sources do not *declassify* the specific operational details of the CIA program that would be necessary to litigate this case, or otherwise negate Gen. Hayden's claim that those details constitute state secrets. It is simply not true, as plaintiffs imply, that the existence of documents publicly discussing the program, and in some cases advancing specific allegations concerning these plaintiffs, is sufficient to defeat the Government's claim that the case concerns state secrets. Remarkably, plaintiffs go so far as to suggest, relying on *Hepting*, 439 F. Supp. 2d at 990, that a matter cannot be a state secret if a public document with "substantial indicia of reliability" discusses that topic. Pls. Opp. at 25. But no case they cite -- not even *Hepting* -- supports that incorrect statement of the law. *See Hepting*, 439 F. Supp. 2d at 990 ("[S]imply because such statements have been publicly made does not mean that the truth of those statements is a matter of general public knowledge and that verification of the statement is harmless."); *El-Masri*, 479 F.3d at 308-09 ("[A]dvancing a case in the court of public opinion, against the United States at large, is an undertaking quite different from prevailing against specific defendants in a court of law.").[4]

On the contrary, it is well-established that information regarding classified intelligence activities remains classified unless and until that specific information is declassified by the United

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[4] Plaintiffs misread *Hepting*. That case did not say that speculation about classified activities contained in documents with "substantial indicia of reliability" -- however that phrase is defined -- opens those activities for examination in a public trial. Rather, *Hepting* used that language in a limiting fashion; it stated that only documents bearing a sufficient imprimatur of *official* disclosure could render the matter no longer a secret. *See Hepting*, 439 F. Supp. 2d at 990 ("Accordingly, in determining whether a factual statement is a secret, the court considers only public admissions or denials by the government, AT&T and other telecommunications companies, which are the parties indisputably situated to disclose whether and to what extent the alleged programs exist."). The Court thus *refused* to consider the declaration of a former AT&T employee who alleged first-hand knowledge of particular information. *Id.*

States. *See Knopf v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975) (classified information is not considered to be "in the public domain *unless there had been official disclosure of it*" (emphasis added)). Official disclosure requires far more than public speculation; for an official disclosure to be found, (1) the information alleged to be in the public domain must be as specific as the information that has been officially disclosed; (2) the disputed information must exactly match the information publicly disclosed, *e.g.*, it must involve the same time period or same operation; and (3) the information must have been publicly released through "an official and documented disclosure." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983)). "An agency's official acknowledgment of information by prior disclosure . . . cannot be based on mere public speculation, *no matter how widespread*." *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (citing *Afshar*, 702 F.2d at 1130) (emphasis added).[5]

Plaintiffs argue that these official disclosure cases are "inapposite[]" because they arose in the context of Freedom of Information Act ("FOIA") litigation, or in cases involving prepublication review of manuscripts written by former intelligence officers. *See* Pls. Opp. at 26 n.12. This contention could not be more wrong; these cases precisely support the Government's argument and are *essential* to the state secrets privilege analysis because they demonstrate that the information necessary to litigate this case has not been officially disclosed and therefore remains properly classified. Plaintiffs' argument that the official disclosure doctrine "do[es] not empower the government to intervene in cases and remove what is already in the public domain from the court's consideration" misses the point entirely. *Id.* The Government has not attempted to prevent plaintiffs from making the allegations in their Complaint. But, as noted below, it can -- and must -- intervene to prevent the parties from *litigating* the veracity of those allegations when such litigation would divulge state secrets. That litigation process would transform speculation into official findings of

[5] Similarly, media reports and reports of other governments cannot declassify information that belongs to the United States. *See, e.g.*, *El-Masri*, 479 F.3d at 311 n.5 (declining to endorse plaintiff's theory that information is ineligible for protection under the state secrets privilege simply because it has been published in the news media); *Terkel v. AT& T Corp.*, 441 F. Supp. 2d 899, 913-14 (N.D. Ill. 2006) (rejecting contention that media reports about NSA surveillance program render state secrets privilege inapplicable).

fact, and would necessarily expose aspects of the Government's clandestine intelligence operations that should not be exposed. *See El-Masri*, 479 F.3d at 308 ("The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets."). Put differently, "what is in the public domain" is not the *truth* of the matter asserted, but merely the *assertions* themselves. The distinction between the two, which plaintiffs ignore, is the heart of this case.

Finally, in their attempt to argue that the "very subject matter" of the case is not a state secret, plaintiffs also point to statements about the CIA program made by United States officials, including the President, Gen. Hayden, Secretary of State Rice, and other former CIA officials. *See* Pls. Opp. at 29-33. Based on these statements, plaintiffs compile a list of purportedly "crucial details" about the program that, they claim, may be derived from official sources. *See* Pls. Opp. at 33.[6] In fact, those purportedly "crucial" details, the public discussion of which was previously addressed in Gen. Hayden's Public Declaration, *see* ¶¶ 12-19, fall far short of the still-classified details that actually are needed to litigate this case to completion. Plaintiffs' list includes only the most general facts about the program, such as its existence, the fact that the CIA sometimes cooperates with other countries in carrying out such activities, the general numbers of individuals detained as part of the program, an acknowledgment that the CIA abides by the law in conducting the program and that its interrogators are adequately trained, and the specific identities of some individuals detained in the program that the United States intends to bring to trial (none of whom are plaintiffs in this action). The list does *not* include the specific details over which Gen. Hayden has asserted the state secrets privilege -- and that, as described *infra*, are necessary to litigate this case -- namely, certain information that may tend to confirm or deny cooperation with any specific private entity or foreign

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[6] Plaintiffs imply that comments made by then-former CIA Director George Tenet on a televised interview, and in Congressional hearings, constitute an official disclosure of information. *See* Pls. Opp. at 31, 33 n.15. That is incorrect. *See Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) (stating that "we do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought," and collecting authorities for, *inter alia*, the propositions that "information reported in book by former CIA official" and "information . . . already reported in congressional committee report" has not been officially disclosed).

government concerning clandestine intelligence activities; specific information about the CIA's terrorist detention and interrogation program, such as the locations where detainees are held, the interrogation methods used in the program, and the identities of any individuals detained by the CIA that have not already been publicly acknowledged; and certain other information concerning CIA clandestine intelligence activities that would tend to reveal any intelligence activities, sources, or methods. *See* Public Hayden Decl. ¶ 20[7]; *See also El-Masri*, 479 F.3d at 311 ("[T]he public information does not include the facts that are central to litigating his action. Rather, those central facts -- the CIA means and methods that form the subject matter of El-Masri's claim -- remain state secrets." (footnote omitted)).

II. PLEADING-STAGE RESOLUTION IS APPROPRIATE BECAUSE THE FACTS CENTRAL TO THE LITIGATION ARE SUBJECT TO THE STATE SECRETS PRIVILEGE

If this Court accepts the United States' assertion of the state secrets privilege, as it should, it "must next resolve how the litigation should proceed in light of the government's successful privilege claim." *Al-Haramain*, 507 F.3d at 1204 (citing *El-Masri*, 479 F.3d at 304). Plaintiffs erroneously contend that "*only where* 'the very subject matter' of a suit is a state secret . . . is dismissal at the pleading stage permissible." Pls. Opp. at 2 (emphasis added). If "the very subject matter" of the case is not a state secret, plaintiffs argue, further proceedings are required before a state secrets privilege assertion may be considered, and the privilege may only be asserted "on an item-by-item basis during discovery." *Id.* at 27, 36. This is not the law.

Courts have long recognized that pleading-stage resolution of a suit is appropriate and necessary where the state secrets privilege renders it impossible for the case to be litigated to completion. This inability to fully litigate the case may stem from the fact that the "very subject matter" of a suit is a state secret. But it also may owe to any other circumstance where the privilege prevents the parties from litigating the merits of their claims by, for example, depriving them of the ability to establish, or rebut, a *prima facie* case. The Court of Appeals recently reaffirmed this exact point:

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[7] Gen. Hayden's classified *in camera*, *ex parte* declaration contains additional information, which cannot be discussed on the public record, that is essential for this case to proceed. *See, e.g.*, Classified Hayden Decl. ¶¶ 3-9, 21-31, 51-53, 71-73.

> To be sure, a bright line does not always separate the subject matter of the lawsuit from the information necessary to establish a prima facie case. In some cases, there may be no dividing line. *In other cases, the suit itself may not be barred because of its subject matter and yet ultimately, the state secrets privilege may nonetheless preclude the case from proceeding to the merits*.

Al-Haramain, 507 F.3d at 1201 (emphasis added)). *See also Tenenbaum*, 372 F.3d at 777 (affirming dismissal because "Defendants cannot defend their conduct . . . without revealing the privileged information"); *Kasza*, 133 F.3d at 1166 ("If, after further proceedings, the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim .... Alternatively, 'if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.'" (*quoting Bareford*, 973 F.2d at1141)); *Black*, 62 F.3d at 1118 (case properly dismissed because "[t]he protected information precludes Black from establishing a *prima facie* Bivens claim and . . . continued litigation carries with it the risk that privileged information might be disclosed"); *Zuckerbraun*, 935 F.2d at 547 (pleading-stage dismissal appropriate because the dispositive legal questions "cannot be resolved or even put in dispute without access to" information that is "in its entirety classified and subject to the claim of privilege").

Plaintiffs' contrary contention -- that dismissal at the pleading stage is appropriate only where the "very subject matter" is a state secret -- is based on a plainly untenable reading of *Kasza*. Plaintiffs contend that case's passing use of the phrase "after further proceedings" affirmatively *forbids* a court from examining at the outset whether the information subject to the state secrets privilege would inevitably prevent the parties from proving their claims or defenses. *See* Pls. Opp. at 37 (emphasizing phrase). Instead, plaintiffs assert that courts must charge ahead until some future, as-yet-unidentified point at which it would become appropriate to reconsider the United States' privilege assertion. Plaintiffs have not cited -- and cannot cite -- a single case where a court has deferred consideration of a state secrets privilege in this manner.[8] Indeed, that approach would be

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[8] To be sure, plaintiffs do cite some of the many cases in which the state secrets privilege is asserted without seeking dismissal of the action. *See* Pls. Opp. at 23 & n.8. But, as explained in text, this is not such a case; without the information subject to the privilege, the parties cannot litigate the essential elements of their claims and defenses. Indeed, if anything, those cases undercut plaintiffs' argument because they demonstrate that the United States does not view the state secrets

at odds with the Ninth Circuit's most recent state secrets opinion. *See Al-Haramain*, 507 F.3d at 1203 (accepting privilege assertion even though the "very subject matter" of the suit was not a state secret).

Crucially, plaintiffs do not explain how their claims could be litigated to completion without privileged information. At a minimum, plaintiffs must prove that "agents of the United States, Morocco, and Egypt" subjected them to "forced disappearance" and "torture and other cruel, inhuman, or degrading treatment." First Amended Compl. ¶¶ 253, 260-61. Plaintiffs also must prove defendant Jeppesen's purported connection to those activities. *See id.* ¶¶ 236-52, 254-59, 262-66. These allegations cannot be proven without probing the very issues covered by the Director's state secrets privilege assertion, such as: whether these specific plaintiffs were detained as part of the CIA's terrorist detention and interrogation program; whether the CIA cooperated with, *inter alia*, Morocco and Egypt in conducting that program; where the CIA detained individuals as part of this program; whether plaintiffs were subjected to specific detention practices and methods of interrogation; and whether defendant or any other private organization assisted the CIA in conducting the program. Disclosure of this information reasonably could be expected to harm national security. *See* Public Hayden Decl. ¶¶ 21-25; Classified Hayden Decl. ¶¶ 32-50, 54-70, 74.

Instead of explaining how the case could be litigated to completion without this privileged information, plaintiffs simply assert that it would be too "hypothetical" at this point to determine what information is necessary to litigate this lawsuit. *See* Pls. Opp. at 37-38 & n.19.[9] That is just

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privilege as an "immunity" doctrine, *contra* Pls. Opp. at 19-23, but instead carefully evaluates in each case whether the privilege requires the government to also seek dismissal of the litigation.

[9] Plaintiffs also contend, citing *Hepting*, that discovery is required before the Court can determine "the effect of the privilege" in this case. Pls. Opp. at 42 & n.23. The holding of that case is inapposite to allegations like those in the present case, as *Hepting* itself recognized. In *Hepting*, the court found that the case "focuses only on whether AT&T intercepted and disclosed communications or communication records to the government," *Hepting*, 439 F. Supp. 2d at 994, and permitted limited discovery concerning those issues. The court specifically distinguished those facts from *El-Masri*, where -- as in this case -- "the whole object of the suit was to reveal classified details regarding 'the means and methods the foreign intelligence services of this and other countries used to carry out the program.'" *Id.* (citation omitted). No comparable, limited discovery could be devised in such circumstances. *See id.* at 985 (quoting *El-Masri*'s holding that "special discovery

wrong. To be sure, plaintiffs have no knowledge of the full extent of the information covered by the privilege, and thus cannot truly know whether the United States' contentions about the suit are hypothetical. But Gen. Hayden's *public* assertion of the state secrets privilege, standing alone, shows that plaintiffs' contention is incorrect; there is no hypothesizing required to see that the information covered by the privilege goes to the heart of plaintiffs' claims. *Compare* Public Hayden Decl. ¶ 20 (describing privileged information) *with* First Amended Compl. ¶¶ 253, 260-61 (setting forth plaintiffs' core allegations).[10]

The privilege, therefore, renders the parties unable to litigate this case to completion. First, and notwithstanding the large volume of documents that plaintiffs presented to this Court in opposition to the United States' dispositive motion, it is clear that plaintiffs cannot make out a *prima facie* case in support of their claims. This exact issue was addressed by the Fifth Circuit in *Bareford*, 973 F.2d at 1141, where the plaintiffs presented some "2,500 pages of affidavits and documents, all assertedly in the public domain," including "an affidavit of the former captain of the U.S.S. Stark, two affidavits from former employees of General Dynamics, and information contained in Congressional reports and other published sources." Despite these documents, the Court properly concluded that the state secrets privilege prevented the plaintiffs from making out a *prima facie* case, which required more than "substantial evidence from which a judge or jury might find problems, or even wrongdoing, by" the defendant; instead, a *prima facie* case required "proof of what the Phalanx system was intended to do and the ways in which it fails to accomplish these goals." *Id.* at 1142. Because the facts plaintiffs needed to *prove* were removed from the case by the state secrets privilege, plaintiffs could not make out a *prima facie* case, and the litigation could not proceed. *Id.*

Moreover, even if plaintiffs' evidence might suffice to establish a *prima facie* claim, that

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procedures would have been 'plainly ineffective where . . . the entire aim of the suit [was] to prove the existence of state secrets'").

[10] *Kasza*, in fact, strongly undercuts plaintiffs' claim that dismissal at the pleading stage is necessarily hypothetical unless it can be determined that "the very subject matter" of the case is a state secret. In that case, the Ninth Circuit unequivocally held, at the outset, that the Government's assertion of the state secrets privilege "bar[s] [plaintiff] from establishing her *prima facie* case on any of her eleven claims." *Kasza*, 133 F.3d at 1170.

does not mean that this case can actually be *litigated* to completion. Once the privilege is properly invoked, no party to the litigation may use the information covered by that privilege assertion. It is clear now that the privilege would prevent defendant from meaningfully challenging plaintiffs' allegations. For example, defendant would be forbidden to discuss whether or not it cooperated with the CIA as alleged in the Complaint, and would be unable to identify -- let alone call -- witnesses with firsthand knowledge of the program's operations to contest or rebut plaintiffs' allegations. *See El-Masri*, 479 F.3d at 310 (defending against plaintiff's claims "would require the production of witnesses whose identities are confidential and evidence the very existence of which is a state secret"). This inability to mount a defense, in and of itself, is a sufficient basis for disposing of the case. *See, e.g.*, *Tenenbaum*, 372 F.3d at 777 (affirming pleading-stage dismissal of suit because "Defendants cannot defend their conduct . . . without revealing the privileged information"); *see also Kasza*, 133 F.3d at 1166 ("'[I]f the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.'" (*quoting Bareford*, 973 F.2d at 1141)).

At bottom -- and regardless of whether the "very subject matter" of this case can be classified as a state secret, or whether the parties can meet the threshold evidentiary standards for establishing a *prima facie* case or defense -- the relevant question is whether this case can be litigated to completion, and it is apparent *now* that it cannot. *See, e.g.*, *Bareford*, 973 F.2d at 1143 ("Even if we found that Bareford had made out a prima facie case with unprivileged information, we conclude that the state secret doctrine would nonetheless bar the plaintiffs' action because any further attempt by the plaintiffs to establish a prima facie case would threaten disclosure of important state secrets." (citing *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc)). In this regard, the case is identical to *El-Masri*, where the court correctly focused on the crucial distinction between offering material in support of one's claims, and actually *proving* the truth of such allegations.[11]

[11] *Al-Haramain* is not to the contrary. Although that case criticized the Fourth Circuit's analysis of when "the very subject matter" of a case constitutes a state secret, it never took issue with *El-Masri*'s holding that the parties could not litigate their claims and defenses without privileged

Notwithstanding El-Masri's ability to tell his version of the events surrounding his alleged detention and interrogation, the Fourth Circuit found that he could not be permitted to litigate those assertions because "advancing a case in the court of public opinion, against the United States at large, is an undertaking quite different from prevailing against specific defendants in a court of law." *El-Masri*, 479 F.3d at 308-09. To prevail, that plaintiff "would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him." *Id.* at 309. That showing, in turn, "could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations." *Id.* Moreover, as with defendant Jeppesen, the Court in *El-Masri* noted that "[w]ith respect to the defendant corporations and their unnamed employees, El-Masri would have to demonstrate the existence and details of CIA espionage contracts, an endeavor practically indistinguishable from that categorically barred by *Totten* and *Tenet v. Doe*." *Id.* Summing up, the Court noted that "[e]ven marshalling the evidence necessary to make the requisite showings would implicate privileged state secrets, because El-Masri would need to rely on witnesses whose identities, and evidence the very existence of which, must remain confidential in the interest of national security." *Id.*; *see also id.* at 311 (noting that in *Sterling*, 416 F.3d at 341, although plaintiff's "allegations could be stated with no detrimental effect on national security," the case could not proceed "because a judicial resolution of the matter would have required disclosure of how the CIA makes sensitive personnel decisions, and would have involved the production of witnesses whose very participation in a court proceeding would risk exposing privileged information").

The same analysis applies in this case. For plaintiffs to succeed on their claims, they would have to *prove* that they were, in fact, part of the CIA program; that the governments of, *inter alia*, Morocco and Egypt were involved in their detention and interrogation; that they were mistreated by agents of those countries and the United States; and that defendant Jeppesen was connected to these

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information. The Ninth Circuit never reached that issue because, after upholding the government's privilege assertion, it found that the plaintiff was unable to establish the threshold showing required for Article III standing, and thus had no reason to examine whether the parties could ultimately prove the elements of their claims and defenses. *See Al-Haramain*, 507 F.3d at 1205.

activities. Attempting to prove such allegations would inevitably expose state secrets covered by the Director's privilege assertion. *See* Public Hayden Decl. ¶¶ 20-26; Classified Hayden Decl. ¶¶ 75-87, 94; *see also Farnsworth Cannon, Inc.*, 635 F.2d at 281 ("In an attempt to make out a prima facie case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit. Such probing in open court would inevitably be revealing. It is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation.").

Put simply, this Court must take the long view. Where, as here, the Court can determine at the outset that the case cannot proceed to completion, the Court should not postpone the inevitable, and the litigation should proceed no further. *See Sterling*, 416 F.3d at 348 ("[W]here 'the very question on which a case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters,' dismissal is the proper remedy." (quoting *DTM Research, LLC v. AT & T Corp.*, 245 F.3d 327, 334 (4th Cir.2001)). This Court should not "jeopardize the security which the privilege is meant to protect," *Reynolds*, 345 U.S. at 10, by continuing with litigation in which plaintiffs can never prevail. "Courts are not required to play with fire and chance further disclosure -- inadvertent, mistaken, or even intentional -- that would defeat the very purpose for which the privilege exists." *Sterling*, 416 F.3d at 344.[12]

III. THE PURPORTEDLY "ROBUST ALTERNATIVES" SUGGESTED BY PLAINTIFFS ARE INSUFFICIENT TO SAFEGUARD THE PRIVILEGED INFORMATION AND ARE IMPRACTICAL

In lieu of dismissing the suit, plaintiffs suggest that this Court "instead require the government to assert the privilege on an item-by-item basis during discovery." Pls. Opp. at 36. It

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[12] Plaintiffs' arguments concerning the statutory privileges under National Security Act suffer from the same flaws as their state secrets privilege arguments. The United States does not contend that either privilege constitutes an "immunity" doctrine. *Contra* Pls. Opp. at 19-23, 50-51. Instead, the United States contends that, like the state secrets privilege, this statutory privilege provides a basis for removing specific information from this case. It is the effect of removing that information -- *i.e.*, the parties' inability to litigate the suit -- that prevents the litigation from proceeding, and not the assertion of the privilege *per se*.

is not clear exactly what more plaintiffs wish Gen. Hayden to do; his declarations *do* demonstrate with specificity why disclosure of the specific information over which he asserted the privilege reasonably could be expected to harm national security. In a case like this, the avowed purpose of which is to probe the details of alleged intelligence operations, nothing more is required. As the Court of Appeals recognized, once the responsible Department head "has properly invoked the claim of privilege and adequately identified categories of privileged information," that officer "cannot reasonably be expected personally to explain why each item of information arguably responsive to a discovery request affects the national interest." *Kasza*, 133 F.3d at 1169.

Plaintiffs' proposal would turn the Director of the CIA and the Director of National Intelligence (who bear statutory responsibilities to safeguard information regarding clandestine intelligence activities, *see* Public Hayden Decl. ¶¶ 5-6) into special masters of this litigation. These individuals would have to personally review each and every pleading submitted, every discovery request propounded (along with the answers thereto), and every deposition question asked (and the responses provided) to ensure that no classified information is improperly disclosed. And every time a privilege assertion is deemed necessary -- as it often would be, given the nature of the allegations in this case -- the DCIA and/or DNI would be required to assert the state secrets privilege over each item. As this Court has seen, that process requires personal consideration of the matter by the department head, a formal assertion of the privilege, and, inevitably, briefing from the parties followed by a decision from this Court. The burden that such a regime would place upon this Court and the Executive Branch cannot be overstated, and is inconsistent with the numerous cases in which courts have accepted assertions of the state secrets privilege at the outset of the litigation. *See, e.g.*, *supra* at 1-2 (collecting cases). Moreover, this process itself could harm national security, because the mere act of asserting the state secrets privilege over some specific information sought in discovery, and not other information, could reveal information about whether and how the United States conducts intelligence-gathering activities. *Cf. Hunt v. CIA*, 981 F.2d 1116 (9th Cir. 1992) (affirming "Glomar" doctrine, under which the CIA can refuse to confirm or deny an allegation when such confirmation or denial itself would reveal privileged information).

Alternatively, plaintiffs suggest some sort of *in camera* proceeding or other process involving

a special master. *See* Pls. Opp. at 49-50. The Fourth Circuit correctly, and summarily, disposed of such a contention in *El-Masri*, noting that the argument was "expressly foreclosed by *Reynolds*, the Supreme Court decision that controls this entire field of inquiry." *El-Masri*, 479 F.3d at 311. "*Reynolds* plainly held that when 'the occasion for the privilege is appropriate, . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, *even by the judge alone, in chambers*.'" *Id.* (emphasis added and citation omitted); *see also Zuckerbraun*, 935 F.2d at 548 (rejecting argument that discovery and *in camera* proceedings were required in lieu of dismissal).[13] *A fortiori*, then, this Court should not order that plaintiffs, defendant, or some third party be given access to the information. *Cf. Farnsworth Cannon, Inc.*, 635 F.2d at 281(noting counsel's "incentive to probe as close to the core secrets as the trial judge would permit" in order to make out a prima facie case).

Finally, it must be noted that the information over which the United States has asserted the state secrets privilege -- much of which cannot be described on the public record -- permeates every aspect of this case. Any further steps in litigation, including responsive pleadings or even limited discovery, would risk disclosing that which, in the interests of national security, cannot be disclosed. *See* Public Hayden Decl. ¶ 26 ("I have determined that the highly classified information over which I am asserting these privileges is central to the allegations and issues in this case such that any further litigation of this case would pose an unacceptable risk of disclosure of information that the nation's security requires not be disclosed."); Classified Hayden Decl. ¶¶ 75-87, 94. Because, as the Court can plainly see from those declarations, "no amount of effort and care on the part of the court and the parties will safeguard" this material, *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985), the case must be dismissed at the outset. *See also Black*, 62 F.3d at 1119 ("The

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[13] Similarly, plaintiffs call for this Court to exercise creativity in allowing the parties to litigate around the government's assertion of the state secrets privilege. *See* Pls. Opp. at 48. This suggestion is inconsistent with *Al-Haramain*. There, the district court upheld an assertion of the state secrets privilege over a document that the plaintiffs had inadvertently seen, but allowed the plaintiffs to proceed by attesting to their knowledge of its contents (without requiring the document's actual production). The Court of Appeals reversed, finding the approach "contrary to established Supreme Court precedent," which requires the privileged information to be completely removed from the case. *Al-Haramain*, 507 F.3d at1204.

information covered by the privilege is at the core of Black's claims, and we are satisfied that the litigation cannot be tailored to accommodate the loss of the privileged information.").

CONCLUSION

For all the foregoing reasons, the United States respectfully requests that this Court grant its Motion and dismiss this action without further proceedings.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT will be served by means of the Court's CM/ECF system, which will send notifications of such filing to the following:

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